United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 76-4011

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

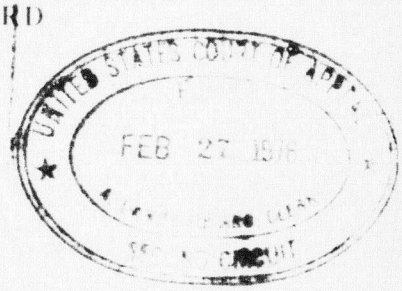
v.

LOCAL UNION NO. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD



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AUTHORITIES CITED

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STATEMENT OF THE ISSUE

Whether the Board abused its discretion in awarding the work of servicing and repairing nonmilk trucks of the Hertz Corporation at its facilities in Maspeth, New York, to employees represented by the Machinists' Union rather than employees represented by Teamsters' Local 584, and therefore finding that the Teamsters' threats to Hertz Corporation with an object of

forcing Hertz to assign the work to employees represented by it violated Section 8(b)(4)(ii)(D) of the Act.

STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order issued on October 28, 1975, against Local Union No. 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein "Teamsters"). The Board's Decision and Order in the unfair labor practice proceeding are reported at 221 NLRB No. 18 (A. 2-10).[1] The Board's Decision and Determination of Dispute made pursuant to Section 10(k) of the Act is reported at 212 NLRB No. 71 (A. 11-19). This Court has jurisdiction under Section 10(e) of the Act, the unfair labor practice having occurred at Queens, New York, where The Hertz Corporation operates a garage to service and repair certain of its rental trucks.

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Teamsters violated Section 8(b)(4)(ii)(D) of the Act by threatening Hertz with an object of forcing Hertz to assign to Teamster-represented employees the mechanical work on nonmilk trucks which the Board found, in a determination pursuant to Section

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[1] "A." references are to pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

10(k) of the Act, employees represented by Machinists[2] were entitled to perform.

A. Genesis of the disputed work.

In 1955, Hertz took over the business of Metropolitan Distributors, Inc., which became Hertz's truck operation in New York, and assumed a contract which Metropolitan then had with the Machinists (A. 4; 49, 95, 113). The Hertz-Machinists agreements at all relevant times have covered "all employees coming under the classifications . . . machinists, mechanics . . ." (A. 4-5; 95-96, 109-112).

In late 1959 and 1960, with such an agreement in effect, Hertz began negotiations to lease milk trucks to Hegeman Holland Farms (herein "Holland"). At that time, Holland indicated that it would lease trucks from Hertz only if Hertz assumed a contract which Holland then had with the Teamsters covering Holland's garage (A. 5; 31a, 96). Hertz explained that it had an "overall agreement" with Machinists and would have "to make sure there was a mutual understanding" before a lease could be executed (A. 96).

Philip G. Marsh, then an officer of Hertz, met with Machinists officers and asked for "an exemption" from their contract to assume Holland's agreement with the Teamsters (A. 97-98). Marsh described the number of vehicles involved and explained that they were "totally wholesale and retail milk" trucks (A. 98). He also indicated that, in addition to taking over the Holland garage, Hertz intended to lease property immediately across the street from the milk plant for a repair shop and assured Machinists that "this specific unit was for the milk operation" (A.

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[2] Local Union No. 447, District 15, International Association of Machinists and Aerospace Workers, AFL-CIO.

98-99). The Machinists gave Hertz permission to assume the agreement with the Teamsters as required by Holland (A. 5; 99).

Marsh thereafter met with Teamsters officials, explained the proposed lease arrangement with Holland, asked about Hertz's responsibilities in assuming Holland's Teamster contract, and told them that Machinists had given permission for such arrangement (A. 99-100). There was no discussion about Teamster-represented employees servicing or repairing any truck other than those leased to Holland (A. 16-17; 100). Hertz thereupon executed the lease agreement with Holland and thereafter adopted the contract of the Greater New York Milk Dealers Labor Committee with Teamsters (A. 5; 31a, 52, 114-115). This agreement covered "every employee of [Hertz] employed in or about a milk distributing branch, pasteurizing plant, and garage in the Metropolitan area . . ." (A. 114). About nine mechanics then employed by Holland became Hertz employees, and 4 of these were still among the 18 or 20 mechanics employed there at the time of the Board 10(k) hearing (A. 5; 31, 89, 91).

Marsh left Hertz's employ in the spring of 1961, and shortly thereafter Hertz began servicing nonmilk trucks in the Holland garage, which is part of the milk plant (A. 5; 33, 87, 100, 102). Hertz also rented a lot across the street, where apparently some repair work was done at times, but in recent times has been used for storage (A. 6 n. 5; 33-36, 88-89, 93). The number of trucks serviced and repaired in Holland's garage has fluctuated over the years, but at present there are approximately 160 milk trucks and 35 nonmilk trucks maintained and serviced there by 18 or 20 mechanics who are members of Local 584 (A. 5; 34, 65,

92).[3] Hertz's 300 other mechanics in the New York Metropolitan area are represented by the Machinists (A. 31).

In late 1972, Machinists learned that Teamster mechanics were working on nonmilk trucks at the Holland garage (A. 5; 75). Machinists-representative Ronald Touanen complained to Hertz about Teamster-represented mechanics servicing nonmilk trucks (A. 5; 37-38, 59, 75-76). Touanen pointed out that Hertz's collective bargaining agreement with the Machinists covered maintenance mechanics at all Hertz locations in Metropolitan New York (A. 5; 37-38, 76-77). Hertz officials promised to discuss the matter further, but never did (A. 5; 37-38, 76-78).

Also during the spring of 1973, in negotiating with Hertz over the renewal of the lease, Holland insisted, as a condition of renewal, that Hertz remove all nonmilk trucks from Holland's garage (A. 6; 38-39, 61). Hertz accepted that condition on the understanding that, as soon as Hertz received 54 new milk trucks it was to provide for Holland, Hertz would move the nonmilk fleet out of the garage to the lot across the street which Hertz was already leasing (A. 6; 41). On May 9, 1973, when Hertz informed the Teamsters of the impending move of the nonmilk trucks, the Teamsters responded that, wherever the nonmilk trucks which had been serviced in the Holland garage were moved, Teamster employees were to continue servicing them (A. 39-40). The Hertz official agreed, but he indicated that "there could be a problem" because the Machinists' Union was claiming the work (A. 61). At that time, Hertz expected to have its milk and nonmilk operations in the separate locations by October 1973, but due to factory delays in delivery of new

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[3] Hertz has about 12 mechanics at other locations servicing milk trucks who also are represented by Teamsters under similar lease agreements with other milk companies (A. 31-31a), but there is no issue here regarding their work assignments.

milk trucks for lease to Holland, the move had been postponed to July 1974 at the time of the 10(k) hearing (A. 6; 41-42).

B. Teamsters threaten Hertz.

On November 7, 1973, Hertz, finding itself in a "dilemma" respecting the assignment of mechanics for the nonmilk fleet, arranged a meeting with representatives of both unions together in the hope of resolving the dispute (A. 6; 42-43). Teamster representative Joseph Barone and Machinists representative Touanen both threatened to strike Hertz if the work on the nonmilk trucks were given to the other union (A. 6; 44-45, 63).

C. The Section 10(k) Proceeding.

On January 16, 1974, Hertz filed charges against both unions, alleging violation of Section 8(b)(4)(ii)(D) of the Act.

Pursuant to Section 10(k) of the Act, the Board directed a hearing, which was held on April 3 and 10, 1974. There, Hertz stated it was "caught right in the middle . . . between two unions with which it . . . wishes to continue to have a harmonious relationship" (A. 103), but because of "the sensitive nature of the tripartite relationship here" declined to take a position as to which union should be awarded the disputed work (A. 104). Hertz, however, did take the position that all the nonmilk truck repair work should be awarded to either one union or the other because it would cause Hertz "operational chaos and disaster", which could result in closing part of the facility (A. 104), if the work were split between them (A. 105).

On July 23, 1974, the Board issued its Decision and Determination of Dispute (A. 11-19) finding that Hertz employees represented by Machinists were entitled to the nonmilk truck repair work. The Board further determined that the Teamsters were not entitled, by means proscribed by Section 8(b)(4)(ii)(D) of the Act, to force or require Hertz to assign the work to Teamster-represented employees, and directed the Teamsters to notify the Board's Regional Director whether or not they would refrain from such conduct (A. 18-19).

D. The Unfair Labor Practice Proceeding.

On September 27, 1974, after Teamsters declined to comply with the Board's determination, the Board's General Counsel issued the instant complaint (A. 1). At a hearing before an Administrative Law Judge, the parties agreed to transfer the proceeding directly to the Board for decision (A. 3). For purposes of this proceeding, Teamsters Local 584 admitted having threatened, coerced, and restrained Hertz by threatening work stoppages and picketing with an object of forcing Hertz to continue to assign the servicing, maintaining, and repairing of the disputed nonmilk trucks to employees represented by Teamsters Local 584 rather than to employees represented by the Machinists' Union (A. 3 n. 3; 22).

II. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board found that Local 584 violated Section 8 (b)(4)(ii)(D) of the Act by threatening to picket and cause a work stoppage directed at Hertz with an object of forcing Hertz to assign the disputed nonmilk truck maintenance to Teamster-represented employees (A. 7), in contravention of the Board's Section 10(k) Decision and Determination of Dispute (A. 3n. 4), awarding this work to Machinists-represented employees (A. 3 n. 1; 11-19).

The Board's order requires Local 584 to cease and desist from the unfair labor practice found (A. 8). Affirmatively, the order requires Local 584 to post the usual notices (A. 9).

ARGUMENT

THE BOARD DID NOT ABUSE ITS DISCRETION IN AWARDING THE WORK OF SERVICING AND REPAIRING NONMILK TRUCKS OF HERTZ AT ITS MASPETH, NEW YORK, FACILITIES TO HERTZ EMPLOYEES REPRESENTED BY THE MACHINISTS UNION RATHER THAN TO EMPLOYEES REPRESENTED BY THE TEAMSTERS LOCAL 584 AND THEREFORE LOCAL 584's THREATS WITH AN OBJECT OF FORCING HERTZ TO ASSIGN THE WORK TO EMPLOYEES REPRESENTED BY IT VIOLATED SECTION 8(b)(4)(ii)(D) OF THE ACT.

The only question before the Court is whether the evidence in the Section 10(k) proceeding required the Board to find that employees represented by Teamsters Local 584, rather than other Hertz employees represented by Machinists Union No. 447, were entitled to perform the service and repair work on Hertz's nonmilk trucks at Maspeth, New York. For, if the Board did not abuse its discretion in the arbitration-type 10(k) proceeding,[4] Local 584's admitted conduct of threatening Hertz with picketing and a strike to force Hertz to assign the nonmilk truck work to Teamster-represented employees and refusing to abide by the Board's 10(k) determination violated Section 8(b)(4)(ii)(D) of the Act.[5]

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[4] See *N.L.R.B. v. Radio and Television Broadcast Engineers Union, Local 1212*, 364 U.S. 574, 583 (1961) (herein "CBS").

[5] Section 10(k) provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D), of Section 8(b), the Board is empowered and directed to hear and determine the dispute

(continued)

Under Section 10(k), Congress has assigned to the Board the "responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision." *CBS*, 364 U.S. at 586. In making such decisions, the Board employs its "long experience in hearing and disposing of similar labor problems" along with "a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem." *Ibid.* In brief, the Board must make work assignments on the basis of its "experience and common sense." *N.L.R.B. v. Local 25, I.B.E.W.*, 396 F.2d 591, 594 (C.A. 2, 1968), quoting *CBS, loc. cit. supra.* "[T]he impact of the § 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding." *N.L.R.B. v. Plasterers' Local Union No. 79*, 404 U.S. 116, 126-127 (1971), quoted in *International Telephone & Telegraph Corp. v. Local 134, I.B.E.W.*, 419 U.S. 428, 444-445 (1975). Accordingly, the question before the reviewing court is whether "the Board acted arbitrarily or capriciously in reaching its conclusion," as to the work assignment. *Local 25, loc. cit.*

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[5] (continued):

> out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Section 8(b)(4)(ii)(D) of the Act makes it an unfair labor practice for a union or its agents "to threaten, coerce, or restrain any person engaged in commerce . . ., where . . . an object thereof is . . . forcing or requiring an employer to assign particular work to employees in a particular labor organization or a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. . . ."

As this Court has noted with approval, the Board in making work assignments considers "all relevant factors," for example:

> the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards, and the AFL-CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business.

International Association of Machinists, Lodge No. 1743 (J.A. Jones Const. Co.), 135 NLRB 1402, 1410, 1411 (1962), quoted in *N.L.R.B. v. Local Union No. 3, I.B.E.W.*, 339 F.2d 145, 147-148 (C.A. 2, 1964); *Local 25, supra*, 396 F.2d at 593, and in *Plasterers' Local 79, supra*, 404 U.S. at 132 n. 26. Where the Board has considered all the relevant factors, it is for the Board, and not the courts, to determine the exact weight to accord to each. *Local 25, supra*, 396 F.2d at 594.

Here, some of these factors were inapplicable and others were in balance. Thus, as the Board found (A. 17), both groups of employees possessed the necessary skills and had performed to the satisfaction of the employer.[6] The employer, before the Board, specifically declined

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[6] Before the Board, Teamsters argued that greater efficiency would result from Hertz's employment at both Maspeth locations of a single crew under a single supervisor. The Teamsters' argument plainly was an afterthought since it did not seek to adduce any evidence on this point. Furthermore, Hertz, who as the employer would be more directly affected by inefficiency in the operation, made no such contention but took the position that it would be satisfied with assignment of the work at the new nonmilk location to either group of employees. Hertz is willing to maintain separate garages at the two locations, and at the time of the 10(k) hearing had already begun equipping the quonset structure on its separate lot as "a full-fledged maintenance garage" (A. 35).

to take a position of preferring one group over the other.[7] Nor were there any Board certifications or arbitrators' awards involved. Consequently, the Board was confronted the statutory duty of making a decision essentially upon the basis of Hertz's contracts with the two unions, the historical background of these agreements, and Hertz's long-established practice of assigning truck service and repair work to Machinists "with the exception of this one dispute" (A. 17).

As to the contracts, the evidence is clear that the original Hertz contract with Teamsters was negotiated solely in the context of Hertz's taking over Holland's milk plant garage and employing the eight or nine mechanics whom Holland then employed to service its own trucks. This implicit limitation was underscored by the statement of the Hertz official to the Teamsters in the negotiation of their initial contract that, in assuming Holland's contract with them, Hertz had "the blessing of Local 447 [Machinists] to proceed for that unit" (A. 100).[8] Further, the Teamsters' contract, by its terms (A. 114), refers only to employees "in or about a milk . . . plant and garage," and thus on its face applies only

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[7] The Teamsters, before the Board, contended to the contrary that Hertz had expressed a preference for assignment of the disputed work to Teamsters. This contention, however, is not supported by the evidence. It was based solely upon testimony of a Hertz official that, at one point, "lawyers then employed [by Hertz] had said that if Hertz Corporation had to choose, the work should go to 584 [Teamsters]" (A. 42). This plainly did not represent any position taken by Hertz, but was merely passing advice from counsel no longer employed. It is directly contrary to the considered position which Hertz took, and explained in detail, before the Board (A. 103-106).

[8] John Kelly, an official of Teamsters Local 584 to whom Marsh, the negotiator for Hertz, testified he made this statement was present at the hearing when Marsh testified (A. 99) but was not called to testify, permitting an inference that the Teamsters knew that the Machinists were granting an exemption for the Holland unit. *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 174 (1973).

to garages which are part of a milk plant operation, as is Holland's.[9] Thus, the Board had ample basis for concluding (A. 16-17) that, when Machinists assented to Hertz's assumption of Holland's agreement with Teamsters, "it was, at least as disclosed by the record, understood that the work would encompass only the maintenance and servicing of the milk trucks at the Holland garage." Finally, as the Board found (A. 16-17), although both contracts could be construed to cover the work dispute, the Machinists' contract which covers "all of [Hertz's] employees coming under the classifications" of machinists and mechanics "more precisely provides for coverage" of the work on nonmilk trucks.

As to past practice, it is not disputed that, since Hertz began doing business in the New York Metropolitan area, the overwhelming bulk of its mechanical employees (300 out of 330 at the time of this dispute) have been represented by the Machinists, and that Hertz departed from this practice here only at Holland's request to obtain Holland's business and after obtaining the Machinists' assent to a unit limited to milk trucks. Nor did Teamsters contend that any Teamster employees have ever serviced Hertz nonmilk trucks at any location other than Holland's garage, or at any location devoted to nonmilk trucks, such as the one being established here. Thus, there is ample support for the Board's finding (A. 17) that, for the 16 years during which Hertz has been in the truck leasing business in New York, it has "continuously utilized, to the extent practicable," employees represented by Machinists to service and repair its trucks. In these circumstances, the Board reasonably concluded that

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[9] Moreover, Hertz's contracts with Teamsters, titled "Milk Industry Collective Bargaining Agreement" (A. 114), always have been negotiated by a multiemployer association of milk companies (A. 31a, 52).

this extensive past practice extending to 300 or more employees outweighed the practice of 18 or 20 Teamster employees in the Holland garage working on nonmilk trucks in contravention of Hertz's understanding with the Machinists and, ultimately, to the disapproval of Holland, who had originally required Hertz to recognize the Teamsters. Thus, as the Board found (A. 17), Hertz's "past practice weighs in favor" of awarding the work here to Machinists-represented employees.[10]

In sum, the Board has ample basis for its finding (A. 17) that Hertz's "contractual obligations and its overall past practice" warranted the award to Machinists-represented employees of the particular work here involved — the service and repair of nonmilk trucks at a location separate from Holland's garage and devoted to nonmilk trucks. Thus, confronted by the statutory command to make a decision in a case where several of the factors ordinarily relied upon were in balance, the Board reasonably exercised its "experience and common sense" based on significant differences, and reached a work assignment which is neither arbitrary nor capricious on the basis of the whole record. Accordingly, the Board's finding that Teamsters Local 584 violated Section 8(b)(4)(ii)(D) of the

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[10] Local 584 also contended that the Board's award here is not supported by Board precedent, citing *International Brotherhood of Boilermakers, Lodge No. 1509*, 187 NLRB 11 (1970). However, that case supports the Board's award. Thus, in *Boilermakers*, as here, confronted with a claim based on a contract clause, the Board found the claim unsupported when the clause was read in light of the contractual history. 187 NLRB at 13-14. The Board there also relied on the employer's strong preference for one of the contending groups, a factor absent here. Finally, Local 584's claim of departure from Board precedent appears to be a demand that the Board should have granted more importance to the past servicing by its members of the physical trucks in question. The Board found this factor outweighed by the fact that this past servicing was inconsistent with both Hertz's understanding with the unions and Hertz's past practice of assigning all other maintenance of nonmilk trucks to employees represented by the Machinists. Where the Board has thus considered the relevant factors, it is for the Board and not the courts to determine the relative weight accorded each. *Local 25, I.B.E.W., supra*, 396 F.2d at 594.

Act by threatening Hertz with an object of forcing Hertz to assign the work in contravention of the Board's determination is entitled to affirmance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a judgment should issue enforcing the Board's order in full.

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 26th day of February, 1976.